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IN THE SUPREME COURT OF THE UNITED STATES

AGUSTIN SEGUROLA and
MANUEL SANTIAGO.
Defendants and Plaintiffs
in Error.
vs
United States of America,
Defandant in Error.

No.....

PETITION FOR A WRIT OF CERTIORARI.

The petitioners herein, Agustin Segurola and Manuel Santiago, defendants and plaintiffs in error show unto this Honorable Court, the following:

1.—That the said petioners were tried and convicted in the District Court of the United States for Porto Rico on the charge of "possession" and "transportation" of intoxicating liquors in violation of the National Prohibition law and upon a verdict of guilty were sentenced on both counts, (R. p. 7) on July 21st. 1925; that upon a writ of error sued out in the U. S. Circuit Court of Appeals for the First Circuit, this court by unanimous judgment set aside and reversed the sentence of the District court on the first count of "possession" (R. p. 71), and by majority vote affirmed the convictions of both petitioners on the count of "transportation" (R. p. 71), the dissenting member of the court holding that the search of the automobile was illegal and that the convictions as to both petitioners should be reversed. (R. p. 62).

2.—The assignments of error before the said Circuit Court of Appeals were as follows:

1.—Because the defendants were not furnished, upon application for same, with a copy of the information filed against them in the above entitled cause, as provided by the Act of Congress of 1917, known as the Organic Act of Porto Rico, to which defendants seasonably noted an exception.

2.—Because the defendants were held to answer for a criminal offense in the above entitled cause and tried and convicted thereon without due process of law, because defendants were not furnished with a copy of said charges.

3.—Because the court refused to allow counsel for defendants to cross-examine the witness for the prosecution, police officer Ceballos, as to the source of the information testified by him to have been received to the effect that the approaching automobile in which defendants were was being used at the time by defendants in transporting liquors in violation of the Federal Prohibition Law, to which refusal attorneys for defendants noted an exception.

4.—Because the court admitted as evidence at the trial of said cause the liquors seized by the police officer Ceballos and delivered (it) to the Federal Director of Prohibition for this prosecution, the court having previously, during the trial, refused the attorneys for the defendants to cross-examine the officer Ceballos as the source of the information testified by him to have been received that the defendants were approaching the town of Carolina in an automobile used by them at the time in transporting liquors in violation of the Federal Prohibition Law, to which defendants noted an exception.

5.—Because the court allowed the United States Attorney, over the objection of defendants' attorney to cross-examine the defendant Manuel

Santiago as to matters not properly related to the direct examination, and not pertinent to his defense and to the prejudice of said defendant, to which attorney for defendants noted an exception.

6.—Because the court denied the motion of the defendants, made at the conclusion of the case for the prosecution, to oblige the U. S. Attorney to elect to proceed on the count charging unlawful transportation of the liquors in question or upon the count charging unlawful possession of said liquors, it being shown from the evidence of the prosecution that there was no possession of said liquors by defendants except the possession of same during the act of the transportation charged.

7.-Because defendants were placed in jeopardy twice and tried and convicted twice for the same offense, it not appearing from the evidence of the prosecution that the defendants were in possession described in the information at any time or place except at the time and place they were charged with transporting same.

8.—And specifically, as to the defendant Manuel Santiago, there was insuficient evidence to justify a conviction on either of the two counts charged in the information.

9.—Because the court erred in overruling the defendants' motion for a new trial (See R. 9-11)

3.—Within a date allowed by order, the C. C. A. permitted the petitioners to file a petition for a rehearing upon assignments of error stated therein, (R. pp. 65-69) and on January 26th. 1927 an order was entered denying the said petition because neither of the two judges constituting the majority had expressed a desire to rehear same. (R. p. 71)

4.—Your petitioners respectfully say that the judgment of the C. C. A. of December 18th. 1926, in so far as it affirmed the judgment of the trial court on the count charging "transportation" was erroneous and prejudicial to your petitioners, and to said judgment they assign the following as error.

ASSIGNMENTS OF ERROR.

(a) In not holding and deciding that defendants were entitled to have a copy of the information upon demand therefor, as provided by Sec. 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico, and were therefore tried and convicted without due process of law.

(b) In holding and deciding that the defendants were not prejudiced by not receiving a copy of the information containing the charges upon which they were tried.

(c) In not holding and deciding that the automobile, there being no search warrant, was illegally searched and the liquors illegally seized.

(d) In not holding and deciding that the liquors were erroneouly admitted in evidence, because there being no search warrant, the prosecution showed no "resonable cause " for belief on the part of the officer, as laid down in the rule of this Court in Carroll vs. U. S. 267 U. S., at p. 154.

(e) In not holding and deciding that it was error on the part of the trial court in refusing to permit defendants to cross-examine the officer as to the source of the information alleged to have been received by him by telephone, that the defendant Segurola was approaching the town of Carolina in an automobile transporting liquors in violation of law.

(f) In deciding and holding that the ruling of the trial court was correct, that the telephone message alleged to have been received by the officer that the defendant Segurola was approaching the town of Carolina in an automobile transporting liquors in violation of law, was a "priviledged communication" as to which the defendants could not cross-examine.

(g) In deciding and holding that independently of the alleged telephone message, the facts observed by the officer making the search and seizure, were sufficient to justify th search and seizure of the

liquors and their admission as evidence, under the rule laid down in Carroll vs. U. S. 267 U. S. at p. 154.

(h) In not deciding and holding that the liquors were erroneously admitted in evidence because of prejudicial error committed by the trial court in the proceedings had to identfy the liquors and to prove that they were such as were in violation of law.

(i) As to the defendant Manuel Santiago, independently of the foregoing errors assigned, the court erred in not holding that there was insufficient evidence to sustain a conviction against this defendant.

5.—Your petitioners are advised that the judgment of the U. S. Circuit Court of Appeals is final, and is erroneous, and that this Honorable Court, in justice, should require the case to be certified to it for its review and deteminatfon but only on the errors herein assigned, as by law provided.

6.—Your petitioners say that the holding that the bare statement of an officer of hearsay evidence said to have been received by telephone, may not be inquired into upon cross-examination, and that such furnishes "probable cause" for searching an automobile, without more, reduces the constitutional guarantee to a form of words in this Circuit, in such cases. Under such a holding, as a practical matter, the 4th. amendment disappears from the constitution. Within this circuit enforcement agents may search automobiles without restraint imposed by the 4th and 5th and amendments and the rule in the Carroll case. The holding is a virtual repeal of the amendments mentioned and affects the rights of the citizens of the states, and this territory, composing the first circuit. If the holding be correct the public are at the mercy of police and enforcement officers, as under the ruling complained of, there would be no way to contradict them, nor to punish them or their informants for perjury or to seek redress in damages.

The failure to hold that accused persons charged with the violation of federal laws in Porto Rico are entitled to have a copy of the information or indictment as provided by the Act of Congress of 1917, known as the Organic Act for Porto Rico deprives the inhabitants of this country of

an important right which Congress saw fit to create and to protect. The rights of some millions of citizens are prejudicially affected by the holdings herein complained of.

WHEREFORE YOUR PETITIONERS PRAY that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the First Circuit, sitting at Boston, Mass. comanding it to certify and to send to this court on a day to be designated a full and complete transcript of the record and all proceedings had in said court in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment as complained of be reversed by this Honorable Court, and for such other relief as may seem proper.

SALVADOR MESTRE,
E. B. WILCOX,
Attorneys for Petitioners.

Personally appeared before me Agustin Segurola, who being duly sworn according to law, deposes and says. I am one of the defendants and plaintiffs in error, and petitioners in the above entitled cause; I have read the foregoing petition and the contents thereof is true to the best of my knowledge and belief.

A. SEGUROLA,
Petitioner.

Subscribed and sworn to before me in San Juan, P. R. by Agustin Segurola, one of defendants herein, on this the 25 day of February, A. D. 1927, who is personally known to me.

LULU G. DONOHUE,
Clerk of the District Court of the United States for P. R.

By A. J. AGUAYO.

Notified by receipt of a copy of the foregoing petition on this the ..... day of February, A. D. 1927.

.....
U. S. Attorney.

CERTIFICATE OF COUNSEL.

We the undersigned certify that we have examined the foregoing petition, that in our opinion it is well founded and is entitled to favorable consideration of the court and it is not filed for delay.

SALVADOR MESTRE,
E. B. WILCOX.

I certify that on this date I have mailed in the post office at San Juan, P. R., a true copy of the foregoing petition and petitioner's supporting brief, addressed, postage paid, to John L. Gay, United States Attorney, San Juan, P. R., whose mailing address is that stated.

San Juan, P. R., February 26, 1927.

E. B. WILCOX,
Of Counsel for Ptitioners.

IN THE SUPREME COURT OF THE UNITED STATES

AGUSTIN SEGUROLA and
MANUEL SANTIAGO,
Defendants and Plaintiffs
in Error,

vs

United States of America,
Defendant in Error.

No. .....

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

With some modification we adopt the facts stated by the appellant court in the majority opinion (R. p. 57) reading:

> "The record shows facts as follows: Ceballos was, on May 26th. 1923, an officer in the insular police force. On that day, as the result of confidential information by telephone to the effect that Segurola, in a Buick automobile, was coming from Luquillo to Loiza, Ceballos took a Ford car and went out to meet the expected Buick. When he saw the Buick approaching he attempted to block it, but Segurola manoevered past him. Ceballos then gave chase, keeping Segurola in sight until they reached Carolina, where he passed Segurola, cut in front of and blocked him. Segurola thereupon backed his car, and collided with an electric post. Ceballos then

arrested Segurola, searched his car, and found whiskey, brandy, vermouth and gin. These liquors were seized and were admitted in evidence."

The officer may have purposed intercepting the encoming car but did nothing observable to Segurola to carry such a purpose into effect.

(R. p. 38) The officer stated that he told his chauffer to put his car across the road to stop the oncoming car. But does not state that this was done. Ismael Colón, the chauffer, (R. p. 49) stated that he was told to do so by the policeman, but that he did not do so, as he was afraid o a collission. The police officer, questioned by a juror (R. p. 52) stated that he did not get out of his car to make any sign for Segurola to stop; as he passed by he had to see his uniform. These statements are not contradicted elsewhere in the record. As to the other defendant, Manuel Santiago, he was an accidental passenger and had no knodwledge of the presence of liquors in the car or participation in the transaction. (R. p. 45) His testimony is not contradicted to this effect and there is no evidence connecting him with the transaction except the fact of his being in the car, which was a Buick runabout or roadster, with a large compartment in the rear which was closed. J. Alvarez, witness for the prosecution, (R. p. 50) stated "The liquor could not be seen unless the top of the car was off." This is not contradicted. The liquors seized on May 26th. 1923 were on the following day turned over the Federal Prohibition Director for prosecution in this case. (R. p. 39) There is no local prohibition law in Porto Rico. By agreement and by law the insular police act in enforcing the federal prohibition law, and in no case has the U. S. District Court refused relief because the police are not federal officers. Congress by specific legislation has given the insular courts jurisdiction to try violations of the federal law.

ARGUMENT.

The two points of fundamental importance in this case are the failure of the trial court to direct a delivery to defendants on their request for same, a copy of the charges not received, in violation of section 2 of the Act of Congress

of 1917, known as the Organic Act for Porto Rico, and the illegal search of the automobile and the seizure of its contents in violation of the 4th. and 5th. amendments of the Constitution of the U. S. enacted in section of the Act of Congress of March 2nd. 1917, known as the Organic Act for Porto Rico, as construed by the holding of this Court in reference to the search of automobiles in Carroll vs. U. S., 267 U. S. at page 154. This Court taking jurisdiction on these two points may proceed also to correct the other errors complained of.

ERRORS ASSIGNED.

(a) and (b) may be argued together. They refer to 1 and 2 assigned to the trial court.

> (a) In not holding and deciding that defendants were entitled to have a copy of the information upon demand therefore, as provided by Sec. 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico, and were therefore tried and convicted without due process of law.
>
> (b) In holding and deciding that the defendants were not prejudiced by not receiving a copy of the information containing the charges upon which they were tried.

At the time of the arraignment and at the trial the defendants asked to be furnished with a copy of the charges, and took exceptions when refused them. (R. pp. 5 and 44). Section 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico, reads in part, as follows:

> "That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, and to be informed of the nature and cause of the accusation, and to have a copy thereof, to have a speedy trial."

Unied States vs. Van Duzee, 140 U. S. 165 is relied upon by the appellee as authority that no obligation exists to furnish the copy. This case was to determine the right of

the Clerk to collect fees for such copy, and involved a construction of the Sixth Amendment of the Constitution which contains no specific provision "and to have a copy thereof" as appears in the Organic Act. The situation in Porto Rico under the Organic Act, is like that the Supreme Court in the Van Duzee case intimated it would be in capital case as provided by Sec. 1033, mentioned in that opinion providing that in such cases a copy is to be furnished. The trial Judge said: "I know of no law requiring the same." (R. p. 5) in denying the request. But while holding that under the Sixth amendment, in the Van Duzee case this court said that the Clerk was not entitled to a fee in that case, it also said at page 173:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government, and under the order the Clerk is entitled to his fee."

The *authority* of the court to grant the application rested upon the above quoted language of this court, and the *obligation* to do so rested upon the specific provision mentioned in Sec. 2 of the Act of Congress mentioned.

No enabling legislation appears to have been enacted providing what officer of the court shall furnish the copy, there is no rule of the trial court, in the absence of both the District Court of the United States in the Van Duzee case at page 574 in 41 Fed., correctly we think, says:

> "Under the Code of Iowa, it is required, upon arraignment a copy of the indictment shall be furnished in every case. The common practice prevailing in the state aids the court in determining in what mode the constitutional provision shall be carried out".

Section 142 of the Criminal Code of P. R. in force for over twenty years in Porto Rico, reads:

> "The arraignment must be made by the prosecuting attorney, which consists in reading the informa-

> tion to the defendant and delivering to him a copy thereof."

A fortiori, the holding in the Van Duzee case should apply in a criminal case on a question involving the constitutional rights of an accused.

POINT NOT DECIDED.

While not deciding the point the C. C. A. said that probably the ruling in the Van Duzee case should apply. It seems clear that the Supreme Court meant to hold that if there was specific legislation that a copy must be furnished, as provided in capital cases, the holding would have been different. That appears in the section mentioned of the Organic Act, and it does not appear in the Sixth amendment, construed in that decision. It is also important to bear in mind the court was not passing upon the right of the accused as that right exists in the instant case, and the C. C. A. apparently overlooks the language of this court at page 173:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government, and under such order the clerk is entitled to his fee."

PREJUDICE PRESUMED FROM ERROR.

The C. C. A. assuming that if error was committed, says it was not prejudicial; that the substantial rights of the defendants' were not affected. We shall not cite cases that prejudice is presumed as a matter of law when error is shown. The record would probably not show the prejudice suffered. It would be suffered in hampering and crippling a defendant in the preparation of his case for trial. Such might or might not get into the record. How can it be known what difficulties a defendant might encounter in the preparation of his case for the trial by not having a copy of the charges upon which he is being tried. Our point is *that the record does not show that defendants were*

not thus prejudiced. At the arraignment they demanded a copy and again at the trial objected that they had not been furnished it. We are contending for the recognition of a vital principle with the view of correcting, what we understand to be the mistaken practice of the District court in refusing, by the delivery of a copy of the charges, to inform defendants of "the nature and cause of the accusation." These defendants raised the point at the first opportunity; they never failed to object to being tried without this compliance with the law and we respectfully urge that they are entitled to take the benefit of their objection, and it is most important that the jurisdicion have a clear cut decision on so important a principle.

The following assignments may be considered togother.

(c) In not holding and deciding that the automobile, there being no search warrant, was illegally searched and the liquors illegally seized.

(d) In not holding and deciding that the liquors were erroneously admitted in evidence, because there was no search warrant the prosecution showed no "reasonable cause" for belief on the part of the officer, as laid down in the rule of this court in Carroll vs. U. S. 267 U. S. at page 154.

(e) In not holding and deciding that it was error on the part of the trial court in refusing to permit defendants to cross-examine the officer as to the source of the information alleged to have been received by him by telephone, that the defendant Segurola was approaching the town of Carolina in an automobile transporting liquors in violation of law.

(f) In deciding and holding that the ruling of the trial court was correct that the telephone message alleged to have been received by the officer that the defendant Segurola was approaching the town of Carolina in an automobile transporting liquors in violation of law, was a "privileged communication" as to which the defendants could not cross-examine.

The last stated assignments may be considered together. It was agreed that there was no search warrant. (R. p. 49).

POINT 1.—The search was illegal and it was error to admit the liquors as evidence.

POINT 2.—Reversible error was committed in the proceedings identifying the liquors and attempting to prove that they were of a character prohibited by law.

The decision of the C. C. A. by majority vote, is, first; independently of what the officer observed in the conduct of the defendant, Segurola, that the ruling of the trial court was right, that the telephonic communication alleged to have been received by the officer, was a "priviledge communication", as to which he could not be cross examined, and second; that the search was justified by what the officer saw.

The second will be reserved for consideration under assignment (g) herein, urging that under the holding of this court, in the Silverthorn Lumber Co., Boyd, Gouled, Amos, and that line of cases, the testimony of the officer as to what he observed in this case, was not admissible unless and until "reasonable cause" had been affirmatively proved to justify his attempt to intercept the defendant on the public highway.

SUB-POINT—(a) The telephonic communication was not a "privileged communication", in this case under the rule of the Carroll case.

SUB-POINT—(b) If the telephonic communication was "privileged", the privilege was waived by the government and the officer, by having him, neither claiming it, to testify, in part, to the transaction.

On these points we respectfully invite the attention to the dissenting opinion of the presiding Judge of the appellate court. (R. p. 62).

The facts are few and simple. The officer testified, in proof of his authority to make the seizure, that he received a telephone message that defendant Segurola was approaching the town of Carolina, where the policeman was, in a Buick automobile transporting liquors in violation of the law. As a result of this information he took a Ford car

and went to meet Segurola and attempted to intercept him on the highway. It is evident that such attempted action on the part of the officer was justified as a matter of law, there being no search warrant, only in the event that the telephonic communication was from such a person, and was of such a character, as to constitute "probable cause" as defined by this court in the rule in the Carroll case at page 154. At the trial this officer was not entitled as a matter of law to testify as to what the defendant Segurola did at the time the officer attempted to stop him and later, unless and until the basis for testimony of this character had first been laid by a sufficient affirmative showing of "probable cause" resulting from the reliability of the sender and the content of the alleged telephone message.

Arguing subpoints (a) and (b) together leaving point 2 for a moment, we urge that the communication was not so privileged as this proposition as to their nondisclosure can be invoked in a criminal case, involving constitutional rights of an accused, and especially so since this court has laid down the rule in the Carroll case. It is to be noted that in sustaining the proposition of nondisclosure, the majority opinion in the case, except that of Re. Quarles, 158 U. S. 158 U. S. 532 cites cases of a civil nature in support of its holding that such communications being confidential, are privileged and cannot be disclosed. WE THINK THAT THERE IS AN IMPORTANT DISTINCTION TO BE DRAWN IN THE APPLICATION OF THE PRINCIPLE IN CIVIL SUITS AND CRIMINAL ACTIONS INVOLVING CONSTITUTIONAL RIGHTS OF THE ACCUSED. THAT WHEN THE PRINCIPLE OF THE NONDISCLOSURE OF PRIVILEGED COMMUNICATIONS, WHETHER BASED UPON LAW OR PUBLIC POLICY, MEETS WITH THE CONSTITUTIONAL RIGHTS OF AN ACCUSED, THE FORMER MUST YIELD.

In Re. Quarles supra, asserts only, the constitutional right of a citizen to give information of a violation of the law. That right is nor questioned nor is this point involved in this case. (R. p. 61). No criminal case is cited except the Quarles case, not applicable, not in point.

Subpoint (b). If the privilege existed, it was waived by having the police officer to testify in part as to the

transaction. We relied chiefly upon King vs. U. S. 112 Fed. (C. C. A.) 988-997. A codefendant became a witness for the prosecution, and upon cross examination he was asked to state, what inducements, if any, were offered him to testify. The trial court sustained the objections of the district attorney on the ground that the communication was privileged and confidential. A conviction followed and in reversing the case said:

> "In this case we do not think that there is any necessity to approve or dispute the proposition cited from Roscoe, nor to determine how far the public policy shuts the mouths of witnesses in regard to state secrets can safely be applied when it conflicts with the constitutional right every person tried in the courts in the United States to have a fair and impartial trial. However the main proposition may be, we are clear that conversation of government detectives and other witnesses, with the purpose of inducing and influencing the evidence of such witnesses do not rise to the dignity of state secrets, and when a witness so induced appears on the stand and testifies, he may be cross examined as to any and all inducements made to him on the part of any one in connection with his evidence; and we think it would be intolerable for the government's agents to be allowed to give inducements, and not have the same freely exposed on the witness stand, so as to inform the court and the jury as to the proper weight of the evidence given." (Opinion at page 185)

In Steen vs First National Bank 298 Fed. (C. C. A.) 37-44 For the Court Judge Sanborn said:

> "The owner of the privilege of preventing disclosure of confidential communications cannot, after testifying to, or about them, or to, or about any substantial part of them without claiming the privilege, invoke that privilege to prevent other parties to the communications from testifying to them. He cannot by his silence lay down a shield of his privilege, and assail another with the sword of his

testimony to the privileged communications, and when his adversary essays to defend himself, or to attack him with his version of the testimony of other parties or witnesses to such communications, again seize the shield of his privilege and shut out all testimony as to the confidential communications but his own. He has waived his privilege and such waiver is in no sense contrary to public policy; indeed it is in the interest of truth and justice."

28 R. C. L. p. 430; People vs Molineux, 168 N. Y. 264-333, 61 N. E. 286, and other cases cited in the opinion mentioned.

The C. C. A. in its opinion (R. p. 61) stated the last mentioned case was an authority for the government for therein it appears that the privilege having been waived, it therefore existed. We cited it to show that it could be waived and was considered waived where the witness, owning the privalege, testified in part as to the matter, as was done in the instant case. If it could be waived in a civil action, it could be in a criminal trial, granting but not believing that the communication in the instance case was privileged and could not be withheld under the circumstances in this case.

We think that it would create an intolerable situation if policemen and enforcement agents could stop and search automobiles of citizens, and whether they found liquors or not, could justify their action by taking the witness stand and saying that they had received a telephone message, without compelling them to be more specific under cross examination, especially in cases like the instant case, where it is of fundamental importance to ascertain whether the search was within the rule stated in the Carroll case.

Not to do so, would result in opening wide the door to easily imagined abuses. As we view the decision of the C. C. A. on this point, the question of "probable cause" could not be passed upon by the jury or the court, for the facts upon which it was supposed to be based, would be locked within the breast of the officer. It therefore results that "probable cause" laid down in the rule in the Carroll case, is withdrawn from judicial consideration, both as to whether the supposed facts in reality existed, and as to the suf-

ficiency of the facts to consitute probable cause, both being left, without restraint or control, to the judgment and honesty of enforcement agents.

If the ruling be correct, as the C. C. A. said it was, a malicious person by calling an enforcement officer, could subject all such persons as he pleased, to the humiliation of having their automobiles searched. Or not maliciously, a suspicious person could bring the same about upon what he might regard as "probable cause" or even a suspicion. Policemen and enforcement officers could search whom they willed, and to justify themselves only say that they had received telephonic information. They could not be contradicted and if the statement were entirely false they could not be punished. The holding amounts, in practice, to a repeal of the constitutional restraint.

POINT 2.—Reversible error was committed in the proceedings identifying the liquors and attempting to prove they were of a character prohibited by law.

We do not urge that this is an error affecting the public interest to the extent that, in itself, the court should take jurisdiction to correct it, but that having taken jurisdiction as to other errors affecting the public interest, this court would proceed to consider and correct this alleged error.

As to this, we allege that reversible error was committed. (R. p. 40) The chemist stated that:

> "To determine its fitness for beverage purposes, I made quite a good analysis which included *almost all* of the things which might be expected to be in it." (Italics ours)

At p. 41 when asked if he made an analysis he replied: "Yes, I made an analysis for wood alcohol." At page 42 he states the kind of analysis ha makes, but it is clear that he was testifying as to the analysis he customarily makes, or that should be made, not to the one he made of the sample. It is evident that one made not seeking the presence of all the ingredients that might be used is not one sufficient to enable a witness to testify that the liquor is fit for beverage purposes. This sample may have been, but it was not proven. We think that a district attorney should be held strictly to prove that the liquor offered in evidence is within the definition provided by Congress.

We call attention to a statement of the trial judge at this important point in the case, (R. p. 41). "The Court It is the kind of whiskey as branded". To that moment no one had testified that the liquor in the bottle was whiskey. We know that a federal trial judge is allowed great latitude in commenting upon the evidence. We know of no case where he has been allowed to testify as a witness. When we attempted to insert an objection at this statement, we were not even permitted to complete the objection. (R. p. 41). The court must have been aware that courts had decided that testimony that the liquor is "whiskey" is sufficient proof of the alcoholic content and that it is fit for beverage purposes. Immediately after the annotation of our exception to the statement made by the court, he then proceeded to ask the question, leading the witness:

"Does the bottle contain whiskey?" Of course the witness answered "Yes." "He could not do otherwise without contradicting the Court. We think that the Court here became the advocate (Wallace vs. U. S. 291 Fed. (C. C. A.) p. 973; Starr vs. 153 U. S., 614; Shaffer vs. West Tenn. Co. (C. C. A.) 271 Fed. 820; Sandals vs. U. S. 213 Fed. 569).

This incident goes away beyond any thing condemned in these decisions.

In the same connection, when we examined the witness as to his knowledge as to this matter concerning which he testified as an expert, he was not allowed to answer our question, although the district attorney did not interpose any objection.

Q. Just what is the difference? (Between brandy and whisked).

> "The Court.—I do not think that a man could described it. I can tell the difference and I have no doubt that you can, but as to describing it, I do not think any man could described it. How can you describe the difference between two flowers? It is something that cannot be described".

This was an error, of fact and of law. Of law, in not allowing the question, especially when the district attorney had interposed no objection, and the witness had not said

that he could not answer it. It is not a fact, for an expert as this witness had said he was, could tell the difference, or ought to have been able to tell the difference, as easily as a botanist could tell the difference between a violet and a sun flower.

No objection appears in the record to this statement and ruling, but we ask the court to consider it as error. It may at least be considered in connection with other parts of the incident as to which exceptions are noted, on the point as to whether the court had become the advocate, and we respectfully insist that no conviction should be allowed to stand when an occurrence like the above takes place in the presence of the jury.

THE APPELLATE COURT DID NOT PASS UPON THIS POINT, although pressed upon its attention as a sub-point under our (R. pp. 39-40) assignment of errors containing this part of the record and assigning error thereon. See Petition for rehearing, (R. p. 68) and was one of the grounds for our petition for a rehearing.

> (g) In deciding and holding that independently of the alleged telephone message, the facts observed by the officer making the search and seizure, were sufficient to justify the search and seizure of the liquors and their admission as evidence under the rule in Carroll vs. U. S. 267 at p. 154.

POINT 1.—The facts referred to were not admissible as evidence.

POINT 2.—If the facts were admissible they were insufficient under the rule in the Carroll case.

POINT 1.—We understand that the net result of the rulings of this Court in Weeks vs. U. S. 232 U. S. 383; Amos vs. U. S. 255 U. S. 313; Gouled vs. U. S. 255, 303; Boyd case, 116 U. S. 623; Adams vs. New York, 192 U. S. 585; Silverthorn Lumber Co., and that line of cases it that evidence obtained in violation of law is not admissible. As said in Silverthern Lumber Co. vs U. S. 251 U. S., at page 391,

> "The proposition could not be more nakedly stated. It is that although of course its seizure was

> an outrage which the government now regrets, it may study the papers before it return, them, copy them, and then use the *knowledge* it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, not any advantages that the government can gain over the subject of its pursuit by doing the forbidden act. (Italics ours).

Before the conduct of the defendant Segurola, became admissible as evidence the government was called upon to show the authority of the officer to intercept the defendant on the highway. We contend that what the officer did and what Segurola did was admissible as evidence at the trial only if and when it was shown that the telephone message was of such a character as to its contents, and from a person of such responsibility as to have furnished "probable cause" for the officer, being a reasonably prudent man, to believe that a crime was being committed. Then as a condition precedent, the government should have shown affirmatively that "probable cause" as defined in the Carroll case, existed. The government failed on the direct evidence to do so, all that was shown in this regard was an alleged telephone message that liquors were being transported by defendant. If there had been no cross-examination attempted on the ponit, we urge that the showing of "probable cause" was insufficient—that it was not shown, and there being no search warrant, the officer was without legal authority to attempt to intercept the defendant on the public highway or to follow him and arrest him. After the direct testimony on this point the following transpired. (See Court's opinion, R. p. 60).

CROSS-EXAMINATION

Q—1. Now you have stated that you received confidential telephone information that there was a car coming with liquor, did you not? Yes, sir.

Q—2. Who gave you that information?

Mr. González (Assistant U. S. Attorney). I object as they are secrets of the police force, which

should not be stated in a court of justice, and the stating of the source of such information would be against public policy.

The Court: The objection is sustained.
Mr. Mestre: I take an exception.

(Immediately following the C. C. A. says: "This ruling is right. Vogel vs. Gruaz, 110 U. S. 311. In Re. Quarles, 158 U. S. 532 and citing other cases.

It is urged that this ruling is sustained as being correct, independently of what the defendant did as observed by the officer. That it is a ruling that in effect takes the question of "probable cause" as a question of fact and of law, out of the courts, for no evidence is to be disclosed which would make it possible for the jury to pass upon the truthfulness of the fact or for the court to pass upon the sufficiency of the facts supposed to furnish "probable cause". The result is that "probable cause" is a question solely for enforcement officers to decide and their decision cannot be revised or reviewed by the courts because the facts are not to be disclosed; there would be no way to punish anybody nor to demand redress in damages. As we thus view it, the Constitutional guaranty, in such cases, become a pure nullity.

It follows that there having been no authority for the arrest and seizure shown, the seizure was illegal and the liquors were improperly admitted as evidence, as held by the presiding Judge of the C. C. A.

POINT 2.—If the facts were admissible they were insufficient under the rule in the Carroll case.

To determine this, as the sufficiency of the telephone message is not shown, the facts which occurred, must be entirely disassociated from what the officer is supposed to have learned through the alleged telephone message, as though it did not exist. Do the facts here fall within the rule in the Carroll case. There the Court took judicial knowledge that Detroit was near the internation boundary line over which large quantities of contraband liquors were being introduced and over that particular highway. The officers knew that those defendants were "bootleggers" who

had previously agreed to deliver to these officers, disguised, a quantity of liquor. The officers knew the car they stopped as one used by defendants in illegally transporting liquors. These were facts personally known to the officers, not told them by some other person. In the instant case there is no question of an international boundary, nor of a place where liquors were habitually imported, or imported at all. Defendants are citizens on a highway within the United States, not known as "bootleggers" or persons who had ever violated the Volstead or any law, and the car was not shown to be one ever used in transporting liquors or used in violating any law.

The officer's version as to the acts of the driver of the car was that he passed him going fast. The car did not appear to have been carrying any load that seemed suspicious; Segurola did not appear to be intoxicated, nor did the other defendant; no liquors were seen nor was there the odor of liquors detected. Defendant went fast past an officer in uniform seated in another car on the road, **who made no sign for defendant to stop as he passed.** Later when the officer appeared in the town in front of Segurola, he backed his car and collided with a telephone post. Backing a car is a natural thing to do to get past another car in front.

From these facts it is urged that the officer had "probable cause" for believing that a crime was being committed in his presence. The officer refers to his state of mind in this particular as only a "suspicion". (R. p. 51) at "Cross examination by Mr. Mestre." By the officers own statement he did not act in making the seizure solely on the ground of what he observed but in part because of the telephone message.

"I seized this car because of confidential **information which I received by telephone,** and **also** the **manner** in which Segurola acted in passing me at high speed."

It is urged that the alleged telephone message, as a matter of law, was not available for consideration as a part of the basis for"probable cause",as it clear by was,as seen from the facts in the case and the above statement of the officer. It is inconceivable that the officer, if he were a reasonably prudent man, would have made the seizure on what he

observed, if he had not, in forming his judgment, depended upon the alleged telephone message.

> (h) In not deciding and holding that the liquors were erroniously admitted as evidence because of prejudicial error committed by the trial court in the proceedings had to identify the liquors and to prove that they were such as were in violation of law.

This assignment has been argued under POINT 2 of assignment (f). It was assigned as error in the C. C. A. (R. 40) under POINT 2 of the 4th. assignment. The C. C. A. did not pass upon the assignment and made no reference to it. (Opinion, R. p. 57) The failure to pass upon the point was one of the grounds for the petition for a rehearing. (R. 68).

> (i) As to the defendant, Manuel Santiago, independently of the foregoing errors assigned, the court erred in not holding that there was insufficient evidence to sustain a conviction against this defendant.

There is not evidence in this case upon which a conviction could properly stand against the defendant. The evidence as to him was that he was riding in the car where the liquors were concealed in the rear compartment and that they could not be seen unless the top of the compartment was lifted. This man was in Fajardo and wanted to come to San Juan where he lived, and seeing Segurola, who also lived in San Juan, passing in this car, requested a seat to San Juan. This defendant took the stand and said that he did not know that the liquors were in the car, and had no connection with the transaction. The judgment rests upon pure conjecture and suspicion. There is no evidence that excludes a reasonable hypothesis of innocence.

> "One walking along a public highway accepted an invitation to ride in an automobile which was at the time and without his knowledge carrying intoxicating liquors in which he had no interest and was in no way connected therewith, would not be guilty of transporting liquor." Payne vs State (Ind) 143 N. E. 283.

> "Where the defendant rode in his son's automobile with his son and there was no evidence that he had any knowledge of the whiskey being in the back of the car, or that he had any interest in it, cannot be found guilty of transportation."
>
> Ponton vs State (Tex) 261 S. W. 155.

The burden was on the prosecution to prove beyond a reasonable doubt that this defendant was interested in this transaction.

> "Where one rides in a truck in which whiskey was being transported, and who had no control over the truck or liquor and has no interest in the transportation, although he may have known that the truck contained liquor, he was not guilty of transportation or possession.
>
> People vs Perecino (Mich) 198 N. W. 902.

His association with a woman of accomodating virtue while he was in Fajardo was not shown to have any connection with these liquors. Here adultery exists only when one or both of the parties are married—it was not shown that either were, and if they were, he could not be a conviction therefor, under the Volstead Act, as appears to have been the case.

THE OFFICER WAS AN INSULAR POLICEMAN.

Referring to the illegality of the seizure and the consequent error of admitting the liquors as evidence, it will be noticed that neither in the trial court, nor in the C. C. A. was there any reference in connection with the proposition, that relief will be given by federal courts except when the seizure is made by federal officers. This is undoubtedly due to the fact of the knowledge of these courts of the peculiar situation existing in Porto Rico. This Court is doubtless aware that Congress, to relieve the United States Court here of its congestion caused by a large number of Volstead cases, has given the Insular courts concurrent jurisdiction to try Volstead offenders, and no fact is better known that in the greatest majority of these cases they are brought by the Insular Police, whether filed by them in the Insular or

Federal courts. There are some eight hundred of these policemen and about twelve or fifteen enforcement agents in the federal employ. It would be safe to say that nine tenths of these cases are brought by Insular policemen.

In the instant case the seizure was made on May 26th., and the officer states that on the following day the liquors were turned over to the Federal enforcement authorities, to bring this case. These policemen are engaged in the enforcement of a federal law over which the Insular courts have been given concurrent jurisdiction. Under such circumstances to deny relief in the U. S. Court for an illegal search made by a policeman when the case is brought to the federal court, would in practice in this jurisdiction, reduce the constitutional provision to a mere form of words, in the vast majority of cases as a practical matter depriving United States Citizens of the protection afforded by the 4th. and 5th. amendments specifically reenacted in our organic act.

CONCLUSION

The convictions in this case bring to mind the remarks of Mr. Justice McKenna is his dissenting opinion in the case of Carroll vs. United States, supra.

> "The damnable character of the "bootlogger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. To press forward to a great principle by breaking through other great principles that stands in the way of its establishment ..... in short, to procure an eminent good by means that are unlawful, is as little consonant of private morality as to public justice."
>
> Sir William Scott, The Le Louis, 2 Dodson, Adm. 210, 257, 165 Eng. Reprint, 1464, 1479.

NOTE.—

We stated that in holding that the decision of the trial court was right, not permitting cross-examination of the officer as to the telephone message, the C. C. A. had cited civil cases except In Re. Quarles

we find that we are mistaken. One other criminal case is cited; Arnstein vs. United States 296 Fed. 946.

The cross examination was permitted. (See page 949—par. 8 of the opinion). Other cross examination was excluded not on the ground that it was privileged, but because it was not pertinent. This was improper cross examination. It had no tendency to contradict or explain what was brought out in chief and therefore was properly excluded. (Par. 9 opinion page 949).

In the principal case relied upon by the C. C. A. for its holding—Vogel vs. Grauz—110 U. S. 313 was a suit for damages, and the holding is that in *such a case* the communication will not be disclosed except *with the consent of the government*, (p. 315). In the instant case the officer nor the government claimed the privilege, and both consented when the government placed the officer on the witness stand and had him testify, in part to the transaction, both thus consenting and esstopping themselves from objecting to a full disclosure. Steen vs. First Nat. Bank, 298 Fed. at p. 41; King vs. U. S. 112 Fed. at p. 995; 28 R. C. L. p. 430.

Therefore petitioners pray that the convictions as to both be set aside for the errors herein assigned.

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IN THE SUPREME COURT OF THE UNITED STATES

(October Term 1927)

AGUSTIN SEGUROLA and MANUEL SANTIAGO, *Defendants, Petitioners,* vs. United States of America.	No. 195. On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

PETITIONERS' BRIEF ON THE MERITS

STATEMENT

On an information in two counts—the first for possession, the second for transporting liquor contrary to the National Prohibition Act—both defendants were found guilty. The defendant, Santiago, was fined $100.00 under the first count, $200.00 under the second count, and half the costs. The defendant, Segurola, was fined $200.00 under the first count, $300.00 under the second count and the other half of the costs. A motion for a new trial was denied, and on a writ of error, the Circuit Court of Appeals for the First Circuit, unanimously reversed the conviction of both defendants an the first count—that charging possession—, and by majority vote affirmed the convictions under the second count—that of transportation, (R. 56) Judge Bingham dissenting. (R. 54-56). A motion for a rehearing was not granted and on April 25th 1927, this Court granted a petition for a writ of certiorari (R. 57) which is now before the Court on the merits.

FACTS SHOWN BY THE GOVERNMENT'S EVIDENCE

This evidence is confusing if not contradictory and it is difficult to say with certainty what was proven by it. We submit the following as a fair statement, which contains important facts, as we see the evidence, not included in the statement of the majority opinion of the C. C. A. (R. 50).

Ceballos was, on May 26th, 1923, an officer in the insular police force and on duty at Carolina. On that day, as a result of alleged confidential information received by telephone to the effect that Segurola, in a Buick automobile, was coming from Luquillo to Loiza, Ceballos took a Ford car and went beyond a bridge three kilometers from Carolina, in the direction of Luquillo to intercept the coming Buick which was shown to be a Roadster. (R. 32). When he saw the Buick approaching he told his chauffeur to put his Ford across the road to intercept the oncoming car. "And when I saw the car coming I told my driver to turn my car around in order to block the other car." (R. 32). Which Ceballos does not testify was done, and the driver says was not done. The chauffer, Ismael Colon, a witness for the Prosecution at (R. 43) testified: "When we crossed the bridge we saw a car coming and he (Ceballos) told me 'Now you have got to get in the way of this car and stop it. x x x I told him that I could not do that because I was not going to destroy my car. Then the car that was coming passed us and he turned my car and we followed it'." No attempt was made to stop the Buick as it passed and it was not signaled to stop. (Ceballos R. 45). "No sir, I did not get out of the Ford car to make any signs to him to stop." The Buick was allowed to pass and was followed by the slower Ford to the town of Carolina. There the Buick, said to be running away, stopped and allowed itself to be overtaken. While stopped, the Ford with the officer approached it in an opposite direction. For some reason not clear in the record, Segurola put his car in reverse and collided with an electric wire post. The officer descended, opened a compartment in the rear of the Buick and found liquors, seized same, and arrested the defendants. The liquors could not be seen by any one seated in the car or elsewhere without opening the compartment in the rear. The defendants were taken to the police station. It does not appear that any proceeding under the local law were taken, and no the fol

lowing day, the defendants and the car and liquors were turned over to the Federal Enforcement Officers and this information was filed.

It is conceded that the officer had no search warrant or warrant of arrest. The facts are important since the C. C. A. held that these, independantly of the alleged telephone information, were sufficient to justify the search, seizure and arrest. (R. 52).

ASSIGNMENT OF ERRORS

We respectfully submit that the Circuit Court of Appeals erred in sustaining the conviction of both defendants on the second count (transportation) of the information:

1.—In not holding and deciding that the defendants were entitled to have a copy of the information upon demand therefor, as provided by section 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico and that they were therefore tried and convicted without due process of law.

2.—In holding that the defendants were not prejudiced by not having a copy of the information containing the charges upon which they were tried and convicted.

3.—In not holding and deciding that the automobile, there being no search warrant, was illegally searched and the liquors seized and admitted in evidence at the trial.

4.—In not holding and deciding that the liquors seized were erroneously admitted as evidence at the trial, there being no search warrant or warrant of arrest, because the United States showed no reasonable or probable cause on the part of the officer to believe that a crime was being committed in his presence, as laid down in the rule of this Court in Carroll vs. United States, 267 U. S. at page 154.

5.—In holding and deciding that the facts observed by the officer independently of the alleged telephone message were sufficient to give him reasonable or probable cause to believe that a crime was being committed in his presence, as laid down in the rule of this Court in the case of Carroll vs United States, 267 U. S. at page 154.

6.—In deciding and holding that the ruling of the trial court was right, that the alleged telephone message received by the officer that the defendant, Segurola, was approaching in an automobile transporting liquors, was a "privileged communi

cation" as to which the defendants could not cross examine the officer, he having testified for the government on direct examination, that he had received such a communicaion and acted thereafter upon such information, resulting in the search of the car and the seizure of the liquors.

7.—In not holding and deciding that it was error on the part of the trial court in refusing to permit defendants to cross examine the officer as to the source of his information alleged to have been received by telephone that the defendant, Segurola, was approaching in an automobile transporting liquors in violation of the law, the officer having testified as a witness for the government without objection on the ground of "privalege" that he had received such a message.

8.—In not deciding and holding that the liquors were erroneously admitted as evidence at the trial because of the statement made by the Court during the trial, in the presence of the jury that "*It is the kind of whiskey as branded*" and other prejudicial error committed by the Court in connection with the identification of the liquors and the government's evidence admitted to prove their alcoholic content and that they were fit for beverage purposes (R. 34, 35, 36).

9.—As to the defendant, Manuel Santiago, independently of the errors assigned affecting both defendants, the C.C. A. erred in not holding that the evidence was insufficient to sustain a conviction against this defendant.

ARGUMENT

The two errors alleged of fundamental importance and general concern in this case are; the failure of the trial court to direct a delivery to the defendants upon their request for same, of a copy of the information, in violation of section two of the Act of Congress of 1917, known as the Organic Act for Porto Rico, and the unlawful search and seizure of the automobile and admission of the liquors found as evidence in the trial, in violation of the principles of the 4th, and 5th, amendments of the Constitution of the U. S., reenacted in the Act of Congress of 1917, known as the Organic Act for Porto Rico, and as construed in such cases by the holding of this Court in reference to the search of automobiles in Carroll vs United States, 267 U. S. at page 154. This Court granting a hearing on these two grounds may proceed also to consider

errors committed at the trial, not in themselves matters of sufficient general interest, to be considered alone on certiorari.

Assignment One:

> "In not holding and deciding that the defendants were entitled to have a copy of the information upon their demand therefor, as provided by section 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico and that they were therefore tried and convicted without due process of law."

At the time of the arraignment and at the trial the defendants asked to be furnished with a copy of the charges, and took exceptions when refused them. (R. 5, 24).

Section 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico, in part is as follows:

> "That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, and to be informed of the nature and cause of the accusation, and *to have a copy thereof*, to have a speedy trial etc."

This provision is practically the Sixth Amendment of the Constitution of the U. S. with this phrase added: *"and to have a copy thereof."*

United States vs. Van Duzee, 140 U. S. 169, 172 is relied upon by the United States as authority that no obligation existed to furnish the copy. This case was a civil action to determine the right of the clerk to collect fees for such a copy, to determine which the Court construed the provisions of the Sixth Amendment, which, as stated, contains no express provision "to have a copy thereof" as does section two, above quoted.

The situation in Porto Rico, under the section mentioned, we think is like that which the Supreme Court in the Van Duzee case, said existed in capital cases as provided by Section 1033 of the R. S. mentioned in the opinion, providing specifically that in such cases the copy must be furnished.

In the instant case, when application for the copy was made and refused, the trial Judge said, "I know of no law

requiring the same." (R. 5). But the trial Judge evidently overlooked the statement of the Supreme Court, even under the situation in the Van Dusee case, at page 173. It said:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government, and under the order the Clerk is entitled to his fee."

Therefore, the *authority* of the trial Judge to grant the application rested upon the above quoted language of the Court in the Van Dusee case, and the *obligation* to do so was imposed by the specific provision in Sec. 2 of the Act of Congress of 1917.

No enabling legislation appears to have been enacted providing what officer of the Government shall furnish the copy, there is no rule of the District Court. In the absence of both we think that the District Court of the United States in the Van Dusee case at page 574 of 41 Federal Reporter, correctly said:

> "Under the Code of Iowa, it is required, upon arraignment, that a copy of the indictment shall be furnished in every case. The common practice prevailing in the state aids the court in determining in what mode the constitutional provision shall be carried out."

So, Section 142 of the Code of Criminal Procedure of Porto Rico provides:

> "The arraignment must be made by the prosecuting attorney, which consists in reading the information to the defendant and delivering a copy thereof."

This provision was, and has been in force and has been the common practice for over twenty years in the Insular courts in Porto Rico, and was the common practice in the Federal Court here until with in the past four or five years, when it was discontinued. The Bar has made repeated demands for copies of informations and indictments without receiving them, to the great prejudice we believe, as in this case, of

persons accused in preparing their defense. We think that Congress, in including the words "and shall have a copy thereof" intended in all cases that the accused should have delivered to him free of cost a copy of the charges of which he stood accused in order that he might properly and seasonably prepare his defense, and the Bar has long desired a final ruling on the point.

NOT DECIDED BY THE C. C. A.

While not deciding the point, (R.50,52) the C. C. A. thought that were it to be decided it would have to be in accordance with the Van Duzee case. It seems to us that the C. C. A. overlooked the language employed by this Court in that case:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the Government, and under such order the clerk is entitled to his fee."

and the more important proposition of the constitutional right of an accused to be informed of the nature of the charge against him by having a copy thereof, as provided by Sec. 2 of the Organic Act. This was not before the court in the litigation mentioned of a civil character, to determine the right of a clerk to collect fees.

The denial referred to was prior to the year 1927. We find that Congress has further legislated concerning the matter. By Act No. 563 the 69th. Congress approved, on Jan. 22nd, 1927. "An Act to amend the Act of Feb. 11th, 1925 (43 Stat. at Large, p. 857, Sec. 2) which reads

> "Provided, that in each criminal case not provided in Sec. 1033 of the Revised Statutes of the U. S., the clerk shall furnish each defendant, upon his request, a copy of any information or indictment returned against him, the fees for said copy and the certificate thereto, at the rates provided for by law, to be taxed as costs but such fees shall not be demanded of any such defendant unless and until by order, judgment, or decree of the court the costs in the case are assessed against him."

This legislation clearly, in Federal courts in Continental U. S. establishes the right of the accused to a copy of the information and puts the situation on a par with what we contend it was under the provisions of section 2 of the Organic Act for P. R., containing the provisions of the Sixth Amendment of the Constitution and in addition thereto, "and shall have a copy thereof."

Assignment two.

> "In holding that the defendants were not prejudiced by not having a copy of the information containing the charges upon which they were tried and convicted."

The C. C. A., assuming that if error were committed in not delivering a copy of the charges when demanded held that the defendants were not prejudiced thereby and overruled our assignment of error under the authority of St. of 1919, 40 St. 1181 amending the Judicial Code directing the courts not to reverse for technical errors that do not affect the substantial rights of the parties.

We shall not cite cases that prejudice is presumed as a matter of law when error is shown.

The prejudice suffered in such cases would not probably be shown on the record. It would be suffered in hampering and crippling a defendant in the preparation of his case before the opening of the trial and might be of such a character as that it could not be shown in the record. How could it be known from this record what difficulties and embarrassment the defendants encountered and suffered before the trial began in the preparation of their defense because they were not fully and fairly apprised of the exact nature of the charges they were forced to meet.

Our point is that *the record does not show that the defendants were not thus prejudiced.*

At the arraignment they demanded a copy and at the trial again objected taking exceptions on both occasions at the Court's refusal. The demands were seasonable made.

We are contending for the recognition of a vital principle with the view of correcting what we believe to be the mistaken practice of the District court in refusing to deliver a copy of the charges.

Even should the District Court change the practice complained of by reason of the Act of Congress above mentioned, approved on Jan. 27th, 1927, this would not effect the error committed in this case of refusing a copy, if the right to have it existed under section 2 of the Organic Act for P. R., as we contend it does, and we respectfully submit that these defendants are entitled to take the benefit of their demand and exception seasonably made and taken.

Assignments three, four, six, and seven are as follows:

Three: In not holding and deciding that the automobile, there being no search warrant, was illegally searched and the liquors seized and admitted in evidence at the trial.

Four: In not holding and deciding that the liquors were erroneously admitted as evidence at the trial, there being no search warrant or warrant of arrest, because the United States showed no reasonable or probable cause on the part of the officer to believe that a crime was being committed in his presence, as laid down in the rule of this Court in Carroll vs United States, 267 U. S. at page 154.

Six: In deciding and holding that the ruling of the trial court was right, that the alleged telephone message received by the officer that the defendant, Segurola, was approaching in an automobile transporting liquors, was a "privileged communication" as to which the defendants could not cross examine the officer, he having testified for the Government on direct examination, that he had received such a communication and thereafter acted upon it, resulting in the search of the car and the seizure of the liquors.

Seven: In not holding and deciding that it was error on the part of the trial court in refusing to permit defendants to cross examine the officer as to the source of his information alleged to have been received by telephone, that the defendant, Segurola, was approaching in an automobile transporting liquors in violation

of the law, the officer having testified as a witness for the government without objection on the ground of "privalege", that he had received such a message.

We think that these assignments may be argued together under the following points.

POINT 1. There being no search warrant or warrant of arrest the search of the automobile and the seizure of the liquors were unlawful and their admission in evidence was error.

POINT 2. The refusal of the trial court to permit the defendants to cross examine the officer as to the source of his alleged telephone message was prejudicial error.

As to point one. The motion to suppress the liquors as evidence because they had not been properly identified and because the search of the automobile was unlawful, was denied and exception noted. (R. 37) The decision of the C. C. A. is that, independently of the information received by the officer, he had reasonable or probable cause to believe that a crime was being committed in his presence. This we leave for discussion under another assignment.

There is no need to argue the net result of the holdings of this court in Boyd vs United States, 116 U. S. 303; Silverthorn Lumber Co. vs U. S. 251 U. S. 319; Gouled vs U. S. 255 U. S. 303; Amos vs U. S. 255 U. S. 313 as to the use of unlawfully obtained evidence, and Carroll vs U. S. 267 U. S. at page 154, laying down the rule under which automobiles may be searched.

THERE BEING NO SEARCH WARRANT IT WAS INCUMBENT UPON THE GOVERNMENT TO JUSTIFY THE SEARCH BY SHOWING REASONABLE OR PROBABLE CAUSE ON THE PART OF THE OFFICER TO BELIEVE THAT A CRIME WAS BEING COMMITTED. This is attempted by showing a telephone message. This we contend was not done because we think that fundamental error was committed in connection with this evidence in not permitting the defendants to cross examine the officer as to the source of his information. (R. 16) AS THE LATER ACTIVITIES OF THE OFFICER WERE DUE EXCLUSIVELY TO

THIS ALLEGED MESSAGE, ITS EXISTENCE, SOURCE, AND CHARACTER SHOULD HAVE BEEN LEGALLY PROVEN TO BECOME AVAILABLE TO PROVE PROBABLE CAUSE.

BUT EVEN IN SUCH A CASE CAN IT BE DONE HERE WHEN IT IS EVIDENT THAT THE OFFICER WOULD HAVE SEEN NOTHING but for the alleged telephone message. Without this being properly proven, on the record he was a trespasser from his first attempt to intercept defendants.

PRESUMABLY THE OFFICER COULD HAVE SECURED A SEARCH WARRANT HAD HE BEEN ENTITLED TO IT.

By asking this court to take judicial notice of the laws of Porto Rico, we are able to call attention to the fact that at the officer's post—Carolina—there were both, a justice of the Peace and a Municipal Judge with authority to administer oaths and issue search warrants. The Carroll case is said to establish a distinction in regard to the search of premises and that of automobiles because in the great majority of cases to require a search warrant to search a swifty moving vehicle would result in exempting them from search as a practical matter for they would disappear before the warrant could be secured. But we do not think that the Supreme Court intended by its decision in the Carroll case to relieve enforcement officers from the obligation of securing a search warrant to search automobile under circumstances that permit it to be done, which we think existed in the instant case, and have such officers to precipitately rush off to search automobiles on questionable information without proceeding with that circumspection which indicates a due regard for citizens "lawfully within the country, entitled to use the highways" as said in the Carroll case.

In the instant case the officer after receiving the alleged telephone message, could have applied to a local judicial officer for a search warrant and presumably could have secured it in time. He went three kilometers to meet Segurola and not having stopped him, returned to Carolina and found him in the town. He might have sent some other policeman out to locate Segurola and keep him in view, while he remained in the town toward which the defendant was coming, to secure the search warrant. If the defendant had come into and left

Carolina before the warrant was secured the officer might have intercepted him by telephone or telegraph on ahead, on the authority of the search warrant. Apparently what happened here was what too frequently happens and that was the officer was little impressed with fundamental importance of the constitutional restraint prohibiting unreasonable searches and seizures. Ought it not to be held by the Courts that when the circumstances reasonably permit in such cases, officers must apply for and secure a search warrant, if the constitutional protection is to be strictly enforce, as has been held

Point 2. The refusal of the trial court to permit the defendants to cross examine the officer as to the source of the telephone message was prejudicial error. This point is closely related to the preceding one.

Little need be said by way of argument that has not been said by Judge Bingham in his dissenting opinion (R. 54, 55, 56). If the communication of the officer were privileged, whether the privilege belonged to him or the government we need not discuss, since his direct evidence was produced by the government and he testified in chief without asserting his privilege. Both waived it, if it existed. Steen vs. First National Bank 298 Fed. (C. C. A.) 37 44.

> "The owner of the privilege preventing disclosure of confidential communications cannot, after testifying to or about them, or to or about any substantial part of them without claiming the priviledge, invoke that privalege to prevent other parties to the communications from testifying to them. He cannot by his silence lay down the shield of his privalege and assail with the sword of his testimony to the privileged communications, and when his adversary essays to defend himself, or to attack him with his version of the testimony of other parties or witnesses to such communications, again seize the shield of his privalege and shut out all testimony as to confidential communications but his own. He was waived his privalege and such waiver is in no sense contrary to public policy; indeed it is in the interest of truth and justice."

28 R. C. L. p. 430; People vs Molineux, 168 N. Y. 264-333, 61 N. E. 286, and other cases cited in this opinion writen by Judge Sanborn. Also in principle, King vs U.S. 112 Fed. (C.C.A.) 988-997. In King vs. U. S. supra, the C. C. A. reversing the conviction below, said:

> In this case we do not think that there is any necessity to approve or dispute the proposition cited from Roscoe, nor to determine how far the public policy shuts the mouths of witnesses in regard to state secrets can safely be applied when it conflicts with the constitutional right every person tried in the courts of the United States to have a fair and impartial trial. However the main proposition may be, we are clear that conversation of government detectives and other witnesses, with the purpose of inducing and influencing the evidence of such witnesses do not rise to the dignity of state secrets, *and when a witness so induced appears on the stand and testifies, he may be cross examined as to any and all inductments made to him on the part of any one in connection with his evidence; and we think it would be intolerable* for the government's agents to be allowed to give inducements, and not have the same freely exposed on the witness stand, so as inform the court and jury as to the proper weight of the evidence given." (Opinion at p. 996) Italics supplied.)

and at page 995-6 the court states:

> "In the cross examination of witnesses in criminal cases a wide latitude is permitted. It is alway permissible to show interest, bias, and prejudice of the witness, and to inquire about any and every relevant and material matter in the controversy which in any way tends to throw light upon the feelings of the witness, or explains and makes clear his situation with respect to the defendant. x x x The proposition is elementary." (Citing cases.)

This language was employed in deciding whether a communication made to the United States attorney by a co-defen-

dant, testifying for the government, was privileged, as to what inducement had been offered for him to so testify.

The C.C.A. in this connection in the instant case, holds without qualification that an officer (witness) who has testified in chief as to communications alleged to have been received by him cannot be cross examined by the defendant.

> (R. 53) Q. "Now you have stated that you received confidential telephone information that there was a car coming with liquor, did you not?
>
> A. Yes, sir.
>
> Q. Who gave you that information.
>
> Mr. Gonzalez (Assistant U. S. Attorney) I object as they are secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public safety (policy).
>
> The Court: The objection is sustained.
>
> Mr. Mestre: I take an exception."

This ruling was right. The above from the C.C.A. opinion (R.53). The ruling is without qualification, and, we think is erroneous.

The cases cited in support of the ruling by the C. C. A. are mainly civil cases, suits for damage. In none of these was the constitutional rights of an accused before the court. In Vogel vs Grau 110 U. S. 313 cited in support by the C.C.A., an action for damages, the statement is made that in such cases such communications cannot be divulged *except with the consent of the government*. In that case the district attorney, a witness for the plaintiff, had not testified in chief as to the communication at the instance of the government as in the instant case. In Re Quarles 158 U. S. 532 also cited by the C. C. A. asserts the constitutional right of a citizen to give information of a violation of the law, a question not here in issued. One other criminal case cited: Arhstein vs U. S. 296 Fed. 946, the cross examination was permitted. (See page 949, par 8, opinion) Other cross examination was excluded, not because it was privileged, but because it was not proper cross examination the court saying that it had no tendency to contradict or explain what was brought out in chief. See paragraph 9 of the opinion, page

949. We have not available all the civil cases cited by the C.C.A. in support of this ruling. As to these the principle as we understand it, was not adjudicated.

We think that there is an important distinction to be drawn in the application of the principle of non disclosure of such communications in civil actions and in criminal actions involving constitutional rights of an accused that when the principle of non disclosure of "privaleged communications" whether based upon law or public policy, meet with constitutional rights of the accused, the former must yield in any case it seems that the privalged was waived both by the government and the officer.

We are at a loss to understand the reasoning of the majority opinion (R. 53) where it concludes that Steen vs. First Nat. Bank, supra, an authority against our contention that if the communication was privaleged, it was waived. The opinion says

> "That was a suit for malicious prosecution; it appeared that the bank officials, through whom the plaintiff claimed a groundless prosecution had been instituted, had, at the preliminary examination of Mrs. Steen, voluntarily testified to the confidential communications made by them to the prosecuting officer. Under these circumstances, that learned court held that the privalege was personal and had been waived. But the court recognizes (298 Fed. 40) that if the privalege had been seasonably claimed it would have been the duty of the court to sustain it. The case is, therefore, on analysis of the facts, an authority for the government and not for the defendants, in the instant case."

We cited this case in support of our contention that if the privalege existed, it had been waived because the officer voluntarily testified if the privalege was his, and the government put him on the stand and brought out the testimony as to the communication, if the privalege belonged o the government, which facts parellel those of the voluntary evidence offered by the bank officials at the preliminary hearing referred to in the Steen case, because of which the Court held that the privalege had been waived. We cannot understand then, why the Steen case does not support our contention of

a waiver of the privalege, instead of being against us, as stated in the opinion of the C. C. A.

THIS RULING IS OF FAR REACHING EFFECT.

We think that it would create an intolerable situation if policemen and enforcement agents could stop and search automobiles of citizens and whether they found liquor or not, could justify their action by taking the witness stand and saying that they had received a telephone message, without compelling them to be more specific under cross examination, especially in cases like the instant case, where it is of fundamental importance to ascertain whether the search was within the rule of the Carroll case.

Not to do so, would open wide the door to easily imagined abuses. As we view the ruling of the C. C. A. on this point, the question of "probable cause" could not be passed upon by the jury, for the facts upon which it would be supposed to rest, would be locked within the breast of the officer. There would be no practical way even to dispute them. It therefore results that "probable cause" as laid down in the Carroll case, is withdrawn from judicial consideration, both as to whether such facts really existed and as to their sufficiency, both being left, without restraint or control to the judgment and truthfulness of policemen and enforcement agents. A jury would have no opportunity to pass upon the facts alleged to constitute "probable cause." The need of doing so in the interest of justice becomes of more importance than ever since the decision of this Court in the Carroll case. As to such facts a trial by jury is denied defendants, and the constitutional guaranty against unlawful searches in such cases becomes a nullity.

Assignment Five.—In holding and deciding that the facts observed by the officer, independently of the alleged telephone message, were sufficient to give him reasonable and probable cause to believe that a crime was being committed in his presence, as laid down in the rule of this Court in the case of Carroll vs. United States, 267 U. S. at page 154.

The C. C. A. holds that not considering the telephone message, what the officer saw thereafter gave him "reasonable and probable cause" to believe that the defendant was committing a crime in his presence. (R. 52) We must differ with

the C.C.A. as to what the facts were under the evidence, which appear stated in the opinion. The evidence of the prosecution is confusing. We think that too little of the evidence is stated by the C. C. A. and that a clearer statement is to be found under our opening statement herein. On this point this Court will have to say what was proved and whether the facts shown constituted "reasonable or probable cause" without the aid of the telephone message.

But at the outset we wish to emphasize this point. THAT THESE FACTS WERE NOT AVAILABLE to the government in showing probable cause unless and until it first showed, affirmativly, by legal evidence, without reversible error, the fact and the sufficiency of the alleged telephone message. Every thing that the officer saw thereafter was a direct consequence of that message. Was it shown to be such an one as justified him to stop or to attempt to intercept the car of a citizen going a long a public highway. Until the government had shown, as stated, a proper communication furnishing probable cause was not the officer a trespasser from the beginning in his attempt to intercept the defendants three kilometers away where he went to meet and to intercept them? Is not the principle the same, where an officer without a search warrant or other right enters a house and *after committing a trespass*, observes a violation of the law. Such evidence is inadmissible under the holdings of this court as we understand them. If the cases are parallel how could what the officer saw be considered in this case at all to determine probable cause, if it should be held that the majority ruling of the C. C. A. is wrong fundamentally in excluding the cross examination as to the source and sufficiency of the alleged telephone message. If that be so, then the telephone message is out of the case and the officer went forth to intercept a citizen without authority and was a trespasser *ab initio*. One event followed another, the latter as a consequence of the former, beginning with an unlawful act. The supposed telephone message might not have existed at all, or it might have been anonymous, in which case the officer would not have been justified in intercepting a traveller, or it might have been from some other unreliable source. The defendants on the direct examination could not anticipate that the trial judge would refuse to allow cross examination as to the source of the message. We then urge that the message is out of the

case, and that what occurred thereafter the officer had no right to see and that he was a trespasser from the beginning until the close of his activities resulting from the telephone message.

BUT THE OFFICER DID NOT RELY UPON WHAT HE SAW EXCLUSIVELY, TO MAKE THE SEARCH.

That is evident from his statement and from what the trial judge understood

> "I seized the car because of confidential information which I received by telephone and also the manner in which Segurola acted by passing me at high speed." (R. 44)

The Court: (R. 44)—I am satisfied that this chief of police had a right, by reason of the confidential information received by him and by reason (of) the suspicious actions of the defendant, to believe that a law was being violated and to search the car, and in my opinion that the search of the car was legal, and the motion (to suppress the evidence) will be overruled."

BUT FOR THE SAKE OF ARGUMENT LET IT BE ASSUMED THAT THE OFFICER RELIED WHOLLY UPON WHAT HE SAW AND THAT THESE FACTS ARE AVAILABLE IN ORDER TO DISCUSS WHETHER, TAKEN ALONE, THEY SHOW PROBABLE CAUSE, AS STATED BY THE C. C. A. WHERE IT IS SAID IN THE OPINION

> "On the record there was, therefore, apart from any confidential communication, abundant evidence of probable cause for the seizure under the principles of the Carroll case, supra." (R. 52)

We think that after considering the evidence for the prosecution which is not clear and at places contradictory and at one point incredible, that the facts were briefly these: That after receiving the communication the officer took a Ford car driven by its its chauffer and went 3 kilometers out of the town of Carolina on the highway and at a point beyond a bridge to meet the defendant's Buick roadster. When this car was seen coming the officer told the chauffer to put his

car across the road to intercept the oncoming car which the chauffer did not do; that the defendant passed not having been signalled to stop by the officer who was in uniform, and it went on, followed by the slower Ford, to the town of Carolina, where the Buick stopped. The Ford later by a circuitous route approached the Buick from the front. Segurola for some reason, put his car in reverse and backed into an electric light post. The officer then alighted from the Ford, went to the Buick and searched it and found the liquors, arrested the occupants of the Buick, took them to the police station, and the following day delivered the liquors and the case to the Federal officers and this information was filed. See our statement herein with reference to the record. Reading (R. 52) it is observable that the C. C. A. did not consider important testimony but concluded that Segurola tried to run down the Ford three kilometers from the town and thereafter ran away, and thought that these facts in themselves were sufficient to give the officer reasonable cause to believe that Segurola was transporting liquors. While not admitting that these two facts are shown by the record, fairly considering all the evidence, we do not think that they are sufficient. Did Segurola try to run down the Ford? The translation of the officers evidence (R. 44) shows vagueness and even contradiction. Reading his evidence under the cross examination he states:

"I have stated that I was suspicious because he threw his car against my car and because he ran away at great speed." This in English means that there was a collision. Then he says: "By saying he threw his car against mine I mean he tried to have a collision with my car and if it had not been for my chauffeur, he could have done so" x x x "He tried to bump his car against mine but he had no collision because we let him pass. *From his attitude* he tried to bump his car against mine. We had to let him go by and he ran away. I say he ran away because he was driving at great speed."

> The officer testified (R. 32) "I told my driver to turn my car around in order to block the other car. It was the Buick driven by Segurola that was coming."

There was no evidence that the Ford got in the way of the Buick on the contrary the chauffer of the Ford testified (R.43)

"When we crossed the bridge we saw a car coming and he (officer) told me: 'Now you have got to get in the way of this car and stop it. x x x "I told him that I could not do that because I was not going to destroy my car. Then the car that was coming passed us and he turned my car and we followed it." (R.45) (Officer).

"No sir, I did not get out of the Ford car to make any signs to stop him."

(R. 45) "I was dressed in uniform. I tried to get in his way and make him stop. Yes, sir, there are many Fords turning around on the public roads every day. Segurola should have thought that I was different from any other Ford because he saw my uniform as he was going past because he passed by my side and had to see me."

In view of the entire evidence considered together we think that it is not shown that the Buick collided with, or attempted to run down the Ford as it passed.

Does the record show that the Buick was running away? The officer testified (R. 44): "I say he was running away because he was driving at great speed." If Segurola was running away is it conceivable that he would have stopped at Carolina and allowed the officer to overtake him as he did. He would have continued through the town on his journey as fast as possible. He probable had not noticed an officer in the car as he passed. Certainly he, far from "running away", had no throught of pursuit. It is a matter of general knowledge that a Buick roadster is a faster car than a Ford.

Taking the record as a whole we doubt if it could be correctly found that the defendant tried to run down the Ford and the defendant was running away.

The question then is whether the proven facts as they may be found by this court to be, furnish reasonable and probable cause apart from the telephone communication, and assuming that such facts may be considered in spite of the fact that the telephone communication was not properly proven as we contend.

The facts, assuming them to be as stated by the C.C.A., are far different from those which existed in the Carroll case. There the Court took judicial knowledge that great

quantities of liquor were being introduced from Canada and taken to Detroit across an international boundary. The enforcement officers had *personal* knowledge that the defendants were boot leggers and that the car searched was one habitually *used for transporting liquors*. *In the instant case* the officer had no previous personal knowledge of this matter, there is no question of an international boundary, nor is there in the record or elsewhere anything to show that this place was one where liquor was introduced or transported. There is no evidence that the officer knew the defendants to be bootlegger or that the Buick was a car in which liquors were transported.

It is urged that no facts could be found under the evidence in the instant case approaching those in the Carroll case or could be said, without the telephonic communication, to have furnished "probable cause" nor if consided together with that communication.

The rule laid down in the Carroll case (page 149) seems to require that the facts must be within the knowledge of the officer. It is there said:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably *arising of circumstances known to the seizing officer*, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." (Italics supplied.)

In the instant case the officer had no knowledge of the matter when he first attempted to intercept the defendants. U. S. vs Allen et al 16 F. (2nd) 320 holds that the facts there did not come within the rule in the Carroll case and we think them to have been stronger that those in the instant case. If the search and seizure were unlawful it follows that the arrest made thereafter was unlawful.

Assignment Eight.

> "In not deciding and holding that the liquors were erroneously admitted as evidence at the trial because of the statement made by the Court during the trial, in the presence of the jury that "IT IS THE KIND

> **OF WHISKEY AS BRANDED" and other prejudicial errors committed by the Court in connection with the identification of the liquors and the government's evidence admitted to prove their alcoholic content and that they were fit for beverage purposes."** (R.34,35,36.)

We do not urge that this is an error affecting the public interest to the extent that, in itself, the court should take jurisdiction to correct it, but that having taken jurisdiction as to other errors affecting the public interest, this court would proceed to consider and correct this alleged error.

As to this, we allege that reversible error was committed (R. 43). The chemist stated that:

> "To determine its fitness for beverage purposes, I made quite a good analysis which included *almost all* of the things which might be expected to be in it." (Italics ours)

At p. 34 when asked if he made an analysis he replied: "Yes, I made an analysis for wood alcohol." At page 36 he states the kind of analysis he makes, but it is clear that he was testifying as to the analysis he customarily makes, or that should be made, not to the one he made of the sample. It is evident that one made not seeking the presence of all the ingredients that might be used to render it unfit is not one sufficient to enable a witness to testify that the liquor is fit for beverage purposes. This sample may have been, but it was not so proven. We think that a district attorney should be held strictly to prove that the liquor offered in evidence is within the definition provided by Congress.

We call attention to a statement of the trial judge at this important point in the case, (R. p. 35). "The Court. It is the kind of whiskey as branded." To that moment no one had testified that the liquor in the bottle was whiskey. We know that a federal trial judge is allowed great latitude in commenting upon the evidence. We know of no case where he has been allowed to testify as a witness. When we attempted to insert an objection at this statemen, we were not even permitted o complete the objection. (R. p. 35) The court must have been aware that courts had decided that testimony that the liquor is "whiskey" is sufficient proof of the

alcoholic content and that it is fit for beverage purposes. Immediately after the annotation of our exception to the statement made by the court, he then proceeded to ask the question, leading the witness:

"Does the bottle contain whiskey?" Of course the witness answered "Yes." "He could not do otherwise without contradicting the Court. We think that the Court here became the advocate (Wallace vs. U. S. 291 Fed. (C. C. A.) p. 973; Starr vs. 153 U. S., 614; Shaffer vs. West Tenn. Co. (C. C. A.) 271 Fed. 820; Sandals vs. U. S. 213 Fed. 569).

This incident goes away beyond any thing condemned in these decisions.

In the same connection, when we examined the witness as to his knowledge as to this matter concerning which he testified as an expert, he was not allowed to answer our question, although the district attorney did not interpose any objection.

Q. Just what is the difference? (Between brandy and whisked)

> "The Court.—I do not think that a man could described it. I can tell the difference and I have no doubt that you can, but as to describing it, I do not think any man could described it. How can you describe the difference between two flowers? It is something that cannot be described." (R. 35).

This was an error, of fact and of law. Of law, in not allowing the question, especially when the district attorney had interposed no objection, and the witness had not said that he could not answer it. It is not a fact, for an expert as this witness had said he was, could tell the difference, or ought to have been able to tell the difference, as easily as a botanist could tell the difference between a violet and a sun flower.

No objection appears in the record to this statement and ruling, but we ask the court to consider it as error. It may at least be considered in connection with other parts of the incident as to which exceptions are noted, on the point as to whether the court had become the advocate, and we respectfully insist that no conviction should be allowed to stand when an occurrence like the above takes place in the presence of the jury.

THE APPELLATE COURT DID NOT PASS UPON THIS POINT, although pressed upon its attention as a subpoint under our (R. pp. 39-40) assignment of errors containing this part of the record and assigning error thereon. (See Petition for rehearing.) (R. p. 68) and was one of the grounds for our petition for a rehearing.

Assignment Nine.

As to the defendant, Manuel Santiago, independently of the errors assigned affecting both defendants, the C. C. A. erred in not holding that the evidence was insufficient to sustain a conviction against this defendant.

There is no evidence in this case upon which a conviction could properly stand against this defendant. The evidence as to him was that he was riding in the car where the liquors were concealed in the rear compartment and that they could not be seen unless the top of the compartment was lifted. (R. 44). This man was in Fajardo and wanted to come to San Juan where he lived, and seeing Segurola, who also lived in San Juan, passing in this car, requested a seat to San Juan. This defendant took the stand and said that he did not know that the liquors were in the car, and had no connection with the transaction. The judgment rests upon pure conjecture and suspicion. There is no evidence that excludes a reasonable hypothesis of innocence.

> "One walking along a public highway accepted an invitation to ride in an automobile which was at the time and without his knowledge carrying intoxicating liquors in which he had no interest and was in no way connected therewith, would not be guilty of transporting liquor." Payne vs. State (Ind) 143 N. E. 283.

There is no evidence that he knew that the liquors were in the car and if there were, there must have been shown participation in the transportation. Neither is shown.

> "Where the defendant rode in his son's automobile with his son and there was no evidence that he had any knowledge of the whiskey being in the back of the car, or that he had any interest in it, cannot be found guilty of transportation."
>
> Ponton vs. State (Tex).
> 261 S. W. 155.

"Where one rides in a truck in which whiskey was being transported, and who had no control over the truck or liquor and has no interest in the transportation, although he may have known that the truck contained liquor, he was not guilty of transportation or possession."

People vs. Perecino (Mich.) 198 N. W. 902.

His association with a woman of accomodating virtue while he was in Fajardo was not shown to have any connection with these liquors. Here adultery exists only when one or both of the parties are married—it was not shown that either were, and if they were, he could not be a conviction therefor, under the Volstead Act, as appears to have been the case.

THE OFFICER WAS AN INSULAR POLICEMAN

Referring to the illegality of the seizure and the consequent error of admitting the liquors as evidence, it will be noticed that neither in the trial court, nor in the C. C. A. was there any reference in connection with the proposition, that relief will not be given by federal courts except when the seizure is made by federal officers. This is undoubtedly due to the knowledge of these courts of the peculiar situation existing in Porto Rico. This Court is doubtless aware that Congress, to relieve the United States Court here of its congestion caused by a large number of Volstead cases, has given the Insular courts concurrent jurisdiction to try Volstead offenders, and no fact is better known that in the greatest majority of these cases they are brought by the Insular Police, whether filed by them in the Insular or Federal courts. There are some eight hundred of these policemen and about twelve or fifteen enforcement agents in the federal employ. It would be safe to say that nine tenths of these cases are brought by Insular policemen; here is a working agreement between police officials and Federal authorities.

In the instant case the seizure was made on May 26th., and the officer states that on the following day the liquors were turned over to the Federal enforcement authorities, to bring this case. These policemen are engaged in the enforcement of a federal law over which the Insular courts have been given

concurrent jurisdiction. Under such circumstances to deny relief in the U. S. Sourt for an illegal search made by a policeman when the case is brought to the federal court, would in practice in this jurisdiction, reduce the constitutional provision to a mere form of words, in the vast majority of cases as a practical matter depriving United States Citizens of the protection afforded by the 4th. and 5th. amendments specifically reenacted in our organic act.

However, our understanding is, that under the facts herein and errors assigned, the foregoing proposition not material. Whether the officer be regarded as a Federal official or otherwise, probable cause would have to be shown.

CONCLUSION

The convictions in this case bring to mind the remarks of Mr. Justice McKenna is his dissenting opinion in the case of Carroll vs. United States, supra.

> "The damnable character of the "bootlogger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. To press forward to a great principle by breaking through other great principles that stands in the way of its establishment. . . in short, to procure an eminent good by means that are unlawful, is as little consonant of private morality as to public justice."
>
> Sir William Scott, The Le Louis, 2 Dodson, Adm. 210, 257, 165 Eng. Reprint, 1464, 1479

Therefore petitioners pray that the conviction as to both defendants be set aside for the errors herein assigned.

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